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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

August 7, 1997

1212.011

BY HAND

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

RE: In the Matter of Amendment of Sections 73.1125(a),
73.3526 and 73.3527 of the Commission's Rules
MM Docket No. 97-138
*Comments of Hardy & Carey, L.L.P. in Support
of Proposed Amendments*

Dear Mr. Caton:

Enclosed please find the original and fourteen (14) copies of Comments of Hardy & Carey, L.L.P. in Support of Proposed Amendments, for filing with the Commission in connection with the above-captioned.

If you should have any questions regarding this matter, kindly direct them to the undersigned.

Yours truly,


Bradford D. Carey

BDC/mv
Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of

**Amendment of Sections 73.1125(a),
73.3526 and 73.3527 of the
Commission's Rules**

MM Docket No. 97-138

To: The Commission

**Comments of
Hardy & Carey, L.L.P.
In Support
of Proposed Amendments**

August 8, 1997

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SUMMARY

Hardy and Carey, L.L.P., on behalf of its various clients including Phase II Broadcasting, Inc. and NOPG, LLC, hereby supports the petition of David Tillotson for the amendment of Section 73:1125(a) (the "Main Studio Rule") and 73:3526(b)(1) (the "Public File Rule") of the Commission's rules. Specifically, Hardy & Carey supports amending the current Main Studio Rule by replacing the requirement that AM, FM and television stations maintain a main studio within their principal city contour with the more flexible requirement that the main studio location be reasonably accessible to residents of a station's community of license. Hardy & Carey also supports amending the Public File Rule to permit stations to maintain their public files at their main studio, wherever located or in any reasonable place, including on the Internet, in place of the current requirement to maintain the public file at a location within the community of license.

COMMENTS

Hardy and Carey, L.L.P., on behalf of its various clients including Phase II Broadcasting, Inc. and NOPG, LLC, hereby supports the petition of David Tillotson for the amendment of Section 73:1125(a) (the "Main Studio Rule") and 73:3526(b)(1) (the "Public File Rule") of the Commission's rules. Specifically, Hardy & Carey supports amending the current Main Studio Rule by replacing the requirement that AM, FM and television stations maintain a main studio within their principal city contour with the more flexible requirement that the main studio location be reasonably accessible to residents of a station's community of license. Hardy & Carey also supports amending the Public File Rule to permit stations to maintain their public files at their main studio, wherever located or in any reasonable place, including on the Internet, in place of the current requirement to maintain the public file at a location within the community of license.

I. The current Main Studio Rule fails to recognize the new realities of broadcast station ownership.

The Telecommunications Act of 1996 reconfigured the broadcast ownership landscape by relaxing station ownership and other rules, in order to benefit the public by enhancing competition in the broadcast market. Through this highly competitive environment, the public stands to benefit by way of greater diversity of programming, lower advertising costs and the construction of additional broadcast stations. In its current form, the Main Studio Rule stands as an impediment to competition by imposing an inflexible and unneeded requirement for station owners to maintain a main studio within the principal community contour, or primary reception area, of each station.

With the relaxation of the Commission's rules, station licensees must battle for competitive ground to remain viable. A recent and continuing example of the future of broadcast competition has been the flurry of radio station ownership changes following a relaxation of the Commission's rules to allow a single entity to own between 5 and 8 radio stations in the same radio market. As the broadcast ownership landscape has changed, it has become apparent that, in order to reap the benefits of competition, the Commission must apply its rules governing station operations equally to all owners and must write those rules to empower rather than hinder station owners in their battle for competitive ground. The current Main Studio Rule is restrictive and unfairly puts station owners on unequal footings.

For example, a broadcaster that owns one or two radio stations with studios outside the principal city contours must still meet the Main Studio Rule's requirement to maintain "main studios" within the city contours and separate from its "auxiliary" studios. The cost of maintaining and staffing these additional studios is not insignificant. Renting or purchasing appropriate facilities is only the tip of the iceberg. Property taxes, electricity, phone and water bills, and hiring and paying the salaries of two staff members to run the additional studio -- all these expenses add up quickly, and may cost the station owner up to \$100,000 per year, perhaps substantially more, depending on geographic location. The increased costs thus imposed are especially burdensome on owners trying to remain competitive with larger groups of owners, who have considerably more flexibility and resources to bring to bear in accommodating the burdens created by the rule.

As a result of the disproportionate burden the rule places on smaller broadcasters, the rule threatens the existence of those broadcasters, while discouraging new individuals from building stations. In this way, the rule risks serious harm to the public interest in diversity of voices in the broadcast market. To avoid this result, the Commission should infuse the Main Studio Rule with additional flexibility to permit all broadcasters to take advantage of the efficiencies of collocation and consolidation demanded by today's competitive market or simply delete the rule.

Making the current Main Studio Rule more flexible would be in keeping with the Commission's justifications for previously amending the rule. In 1987, the Commission expanded the Main Studio Rule to account for rapid advances in communications technology. *See Amendment of Main Studio and Program Origination Rules*, 62 R.R. 2d 1582, 1587-88 (1987). Prior to those proceedings, the rule required stations to locate their main studio in their community of license. However, technological advancements which permitted stations to broadcast from other than their main studio led the Commission to expand the main studio rule and permit broadcasters to locate their main studios within stations' "principal community contours." The recent changes in broadcast ownership are a milestone equivalent to the technological advances which dictated the rule change a decade ago. Hardy and Carey believe that changes to the rule will promote flexibility and reasonableness in main studio location requirements, providing a firm footing for competition, and thus permit broadcasters to serve their communities and meet an ever-expanding "local service obligation." Accordingly, the public interest will be served by the

Commission's further relaxation of the Main Studio Rule to afford station owners flexibility in choosing main studio locations, as long as the studio is situated so as to be reasonably accessible to residents of the station's community of license.

As Hardy & Carey has previously pointed out to the Commission, the plight of the licensee of a Class A FM broadcast station licensed to a market in which there is or are one or more Class B or Class C FM stations and/or a clear channel AM broadcast station is one of major structural disadvantages in coverage. The "big boys" cover larger areas and, often, penetrate down-town buildings better. Under the existing rule, a station must have a main studio within its principal community (city-grade) contour. Since that contour for a Class C station exceeds by far that contour of a Class A station, the Class A station may be prevented from building its main studio next to the Class C station with which it must compete or with which it is co-owned. Either way, the public interest is not served now by the present rule.

Hardy & Carey is aware of at least one specific instance where a client with two stations in a market was considering negotiating for a third station that is licensed to another community. However, under the present main studio rule, if the third station were acquired, the client would have been compelled by the present main studio rule to operate a second main studio, thus negating much of the cost savings that he would have experienced as compared to the present stand alone situation in which the station is struggling. Alteration of the main studio rule would offer a substantial chance to the licensee of that station to realize a fair price for the station in an assignment situation. Now, however, the station is almost an orphan because its principal city

contour does not penetrate into either of the two areas in the nearby major market in which the bulk of the stations, which have consolidated ownership, have their main studios.

There can be no doubt that the public would be better served by this "hometown" station surviving, with its obligations to meet the needs and interests of "hometown" intact, if from a main studio in the nearby major city than the station joining the ranks of silent stations.

If there is justification for retaining the main studio rule, Hardy & Carey and its clients that have joined these Comments believe that the public would be better served by the Commission adopting a rule that permits every station in a market (or group of communities with overlapping ownership interests) to have its main studio wherever any one of the stations might have its main studio.¹

Moreover, if it is in some form retained, the Commission should liberally grant waivers of the main studio rule. The Commission grants, on a case-by-case basis waivers of the main studio rule for non-commercial broadcast licensees that establish that such a waiver would be in the public interest. Hardy & Carey is not aware of a single complaint to the Commission that grant of any main studio waiver has ever

¹The major flaw with this system is the ever-changing make-up of stations in markets because of the changing ownership compositions. Thus, a station that might have its main studio in an area because of today's ownership situations, might be able to go further out or be forced to move back in should ownership combinations change. Certainly, once a station has legitimately established a main studio location, it should be grand-fathered from having to move just because the station whose principal community contour established the limit altered its facilities or became no longer part of the market.

engendered. Thus, with a liberal policy of the Commission (by its staff under delegated authority) granting waivers, we believe the public would be well served.

Today, television studio locations can be more complex than were satellite launch pads or they can be starkly simple. And, for a radio station, a satellite receive only dish and a pentium computer with audio interfaces can program the station for days, weeks or even months. With updates to the computer by phone line or satellite, the station can run without human intervention on site for weeks. Does it really matter where this equipment is? We think not. The realities of business conditions today assure that if the station does not stay in touch with its listeners, it will not need to worry about license renewal. Were the Commission to delete the main studio rule, it could be replaced with a simple requirement that the station provide a toll free telephone line for voice calls and perhaps one for facsimile transmissions. The address of the main studio or business office, wherever situated, could be made known to listeners by various methods.

II. The current Public File Rule places harsh and unnecessary competitive burdens on station licensees and discourages public access.

Like the Main Studio Rule, the public file location rules for commercial and noncommercial stations, which, other than for the addition of more materials, have remained unchanged for well over a decade, have not kept pace with the whirlwind ownership changes in the broadcast market. In today's newly competitive broadcast market, multi-station owners are increasingly forced to consolidate broadcast operations, sales efforts, and facilities to obtain and keep a competitive edge and to remain economically viable. The Commission's rules assist in this regard, permitting

owners to consolidate the broadcast operations of several stations at one centralized studio, as long as that studio is within the principal community contour of each station. Notwithstanding this common and growing practice, owners remain subject to the Commission's rules at sections 73.3526(d) and 73.3527(d), which require commercial and noncommercial station licensees to maintain public files in each station's respective community of license.

In today's competitive broadcast market, the expense and inconvenience of maintaining a separate public file places an unacceptable financial burden on station licensees. The current Public File Rule forces broadcast station owners, particularly multi-station licensees, to engage in a pointless yet expensive and time-consuming balancing act which is not consistent with the Commission's stated commitment to public access. More and more often, station licensees are forced to embark on a convoluted and nonsensical campaign to establish and maintain a station's public file. Licensees whose broadcast operations are outside their respective communities of license must consult legal counsel and spend time and money making arrangements with acquaintances at appropriate public locations to set up the public file in their community of license. They must struggle to obtain assurances of hours of operation, compliance with the rules governing access to the file, and arrangements for copying. Broadcasters may need to obtain more than one location for the file, if they are unable to find one location that can meet all of the Commission's requirements. Once these issues are resolved, broadcasters must put in place procedures to assure the public file

is kept up to date, and arrange for periodic checks on the content of the file and on the access procedures the file custodian is observing.

Ironically, in spite all of these efforts by broadcasters, the Public File Rule often does not permit the public ready access to the files or meaningful participation in Commission licensing proceedings. People who wish to view the station's public file too often face a confusing array of stations, owners, and public file locations.

The current outdated Public File Rule only contributes to the public's confusion. For example, a multi-station licensee may have some stations with studios in their respective communities of license with public files at those studios. The same licensee may operate consolidated broadcast operations at a main studio for two or three other stations, whose communities of license are distant from the studio. The public files for these stations are, under the Public File Rule, scattered to the appropriate communities of license.

New Orleans Publishing Group ("NOPG") has for many years published various periodicals and journals in the New Orleans Area. (It does not publish a daily newspaper). Various of its publications are directed at the business community, the hispanic community, the retired community and many other interest groups. NOPG realized it could increase its services to the communities it serves through broadcast media. It acquired two AM stations, now known as WGSO (New Orleans) and WFNO (Norco). Both are operated from studios constructed for the purpose at NOPG's offices in an office building known as "Heritage Plaza" at 111 Veterans Blvd, Metairie, Louisiana. Metairie is the unincorporated (but highly developed) area between the

boundary of New Orleans and the New Orleans airport. A drainage canal, on the bank of which is located Heritage Plaza, forms the boundary between New Orleans and Metairie at that location. Thus, by the width of a canal (over which hundreds of thousands people pass daily), NOPG is required to keep the WGSO public file at a location other than its offices or studios. Similarly, since Norco is located beyond the New Orleans airport, the WFNO public file must be kept at yet another location.

Phase II Broadcasting is the licensee of stations WLTS (Slidell, Louisiana) and WTKL (New Orleans). WLTS and WTKL are operated from a joint main studio and business office in Metairie, Louisiana. In one case, the public file is located in a public library; in the other case, it is located in an attorney's office. To inspect the public files of both stations, a round trip of approximately sixty miles is required.

Typically, an individual goes to a station's studio to access the record, and only then finds out the varied locations of the files. Gaining access to public files becomes a daunting and frustrating campaign, and discourages access. By complying with the rule, owners inevitably make accessing public files more difficult.² The result is limited access and less participation in the licensing process -- in direct conflict with the rules' stated purposes. In contrast, by permitting a station owner to maintain the public file at its main studio, regardless of the studio's location, or at any reasonable location made known to listeners, a less confused public will once again have a

²As a matter of courtesy, many stations do voluntarily make available at the main studio or office a duplicate public file or the materials that are requested that are in the public file, wherever located in order to minimize the hide and go seek aspect of public file inspection.

realistic opportunity to readily access files and participate in the licensing process of broadcast stations.

The content requirement of the public file rule also begs to be updated. The old Public and Broadcasting publication just is meaningless today. It deserves to be deleted from the list.

Comments from the public such as letters to the station, generally fall into one of about three categories. In the first group of letters are those from civic groups and leaders expressing thanks for the plugs and supporting the station. In the event of a contested license renewal, these are the letters the licensee would "trot out" to support renewal. In the second group, fall those letters from listeners and viewers who do not like a program or show host. First Amendment concerns would generally prevent use of these letters against a licensee in a contested renewal. They simply go to the discretion of the broadcast licensee to select programming. In the third group are those letters that may defame a third party. The rules presently give limited relief to licensees to decline to include these letters in the public file. They too would not likely to be of significant evidentiary value in a license renewal proceeding.

On review of the contested license renewal cases of the past, and in considering the changes to the Commission's renewal process mandated in the Telecommunications Act of 1996, it appears that all of the letters saved for years by licensees amount to virtually nothing in the history of renewals. We doubt that one tenth of one percent of the letters kept in the public files are read by concerned citizens. We submit, therefore, that there is no justification for requiring licensees to keep them. In view

of the countless thousands of hours spent on this useless activity, letters from the public should no longer be required to be kept.³

Quarterly issues and programs reports must be placed in each station's public file not later than the 10th day of the next calendar quarter. Other than academic exercises by colleges and universities, enforcement exercises by FCC inspectors and reviews by the licensee's own compliance personnel, we are not aware of any significant attention paid to these reports except in cases of contested license renewals, where the reviewing party has generally either determined to challenge or has already challenged the station's renewal application. However, again, under the provisions of the 1996 Act, renewal challenges have been almost made impossible. So, why require them? There is just not a lot of push by the public to see them.⁴ Similar statements apply to the requirement that the most recent technical application be included in the public file. With today's modern frequency search services and techniques, the coverage of any station should be readily determinable. So let's allow people to sleep without fear of citation because an application, filed with the Commission in 1968 on which the station's technical facilities are based has disappeared (or rotted through) and no replacement is available (even from the Commission).

³It may be necessary to preserve letters related to violent television programming to comply with other rules.

⁴The Commission could devise a brief form that would be supplied to every broadcast station. For a six-month period, each person inspecting the public file would be required to complete the form and return it to the Commission. Thus, the Commission would develop information regarding how often the public files are reviewed. We submit that absent manipulation, the Commission would find that the public file is almost never reviewed by truly concerned citizens.

The public file retention rules are complex and require unnecessarily long retention periods. Certainly, no document should be required to be left in the public file after a substantial transfer of control or assignment of license has been consummated.

Hardy & Carey submits that the most that should be required of broadcast stations is that on request during business hours, every station shall:

identify its most significant programming of the past three months

provide full information on its lowest unit rate and all political time requests for the previous two years

make available current information on the ownership of the station and a copy of the station's last renewal application.

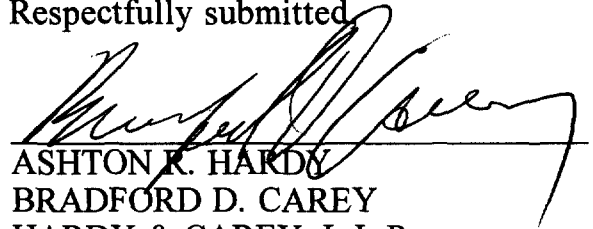
The material to be provided should be made available within 48 hours of the receipt of a request for the documents (Saturdays, Sundays and Federal holidays excepted) . The materials may be made available by sending them to the requestor by facsimile or courier (including overnight courier service), by making them available on the internet, or by making them available at the station's main studio.

If sent by courier or facsimile or by Internet, the records could be stored and sent from wherever a licensee desires, including its home office or attorney's office.

Conclusion

IN VIEW OF THE ABOVE, Hardy & Carey, L.L.P. urges amendment of the rules as set forth.

Respectfully submitted

A handwritten signature in black ink, appearing to read "Ashton R. Hardy", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I, Mary Vance, a secretary in the law firm of Hardy & Carey, L.L.P., do hereby certify that a copy of the above and foregoing Comments of Hardy & Carey, L.L.P. in Support of Proposed Amendments has been served on the following by mailing a copy of same via U.S. Mail, postage prepaid, this 7th day of August, addressed as follows:

David Tillotson
3421 M Street, N.W.
Suite 1739
Washington, DC 20007

Lynn Remly *
Chief, Policy and Rules Division
Federal Communications Commission
2000 M Street, Room 480
Washington, DC 20554

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*By Hand

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